IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 21ST FEBRUARY 2007 / 2ND PHALGUNA 1928

FAO.No. 272 of 2006()

AGAINST THE ORDER DATED 17/10/2005 IN IA 345/2006 IN OS.106/2000 of SUB COURT, MANJERI

.....

APPELLANT/PETITIONER/DEFENDANT

VALAYANKANDAN MOOSA, S/O.MOIDEEN HAJI,
OORAKAM AMSOM, KEEZHMURI DESOM.

BY ADV. SRI.A.K.MADHAVAN UNNI

RESPONDENTS: PLAINTIFF

MULLAN MADAYAN VEERAN HAJI,
S/O.MUHAMMADKUTTY HAJI, MALAPPURAM AMSOM,
KEEZHMURI DESOM.

BY ADV. SRI.SAJU.S.A

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 21/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

KURIAN JOSEPH & K.T.SANKARAN,JJ.

F.A.O.No.272 of 2006

Dated this the 21st day of February, 2007

JUDGMENT

Sankaran, J.

The defendant in O.S.No.106/2000 on the file of the Sub Court, Manjeri, whose application under Order IX Rule 13 of the Code of Civil Procedure was dismissed by the court below, is the appellant herein. The suit was filed by the respondent herein for realisation of money on the basis of an agreement. The execution of the agreement was disputed by the appellant. The document was sent to the expert for comparison of the signature of the appellant with his admitted signature. The expert found that the disputed signature tallies with the admitted signature of the appellant. Thereafter the case was posted for trial. The appellant remained ex parte and the court below passed an ex parte decree on 28-9-2004. I.A.No.1793/2004 was filed by the appellant for setting aside the ex parte decree and that application was allowed

on 3-1-2006. The case was taken up for trial. The chief examination of the plaintiff was completed and his cross-examination was commenced. During the cross-examination of P.W.1 the parties suggested a settlement that if the plaintiff takes oath in a particular mosque at Calicut that he had paid the amount to the defendant, the suit could be decreed. Though the Oaths Act is not in force and though a decree could not be passed only on the basis of oath, since the parties entered into a compromise in that way the court below was inclined to allow that request and directed the parties to take recourse to oath. The terms of the oath were settled and they were agreed upon by the defendant. However, on the date fixed for taking oath the defendant did not turn up before the Mosque and the settlement could not be worked out. Thereafter when the case was taken up for further cross-examination of P.W.1, the defendant did not appear. The court below had no other option but to pass a decree in favour of the plaintiff. I.A.No.345/2006 was filed by the appellant under

Order IX Rule 13 of the Code of Civil Procedure to set aside the ex parte decree. He put forward a case that from 23-1-2006 to 26-2-2006 he was laid up and he produced a certificate issued by a doctor. However, the doctor who issued the certificate was not examined. The court below took note of the fact that the evidence of P.W1 would indicate that the doctor advised him to meet after 15 days and on the third visit the certificate was issued. But the certificate is seen issued on 23-1-2006. This does not tally with the evidence adduced by P.W1. All the facts and circumstances of the case were considered by the court below and it was found that there was no bona fides with regard to the reasons stated in the petition in respect of the non-appearance of the defendant on 28-1-2004 and hence the court below was not inclined to allow the application.

2. Learned counsel for the appellant submits that a last chance may be afforded to the appellant to put forward his case and that he has serious contentions to urge in the suit. Learned

counsel for the respondent, however, contended that the attempt of the appellant is only to protract the proceedings and to delay the disposal of the suit. We are not impressed with the contentions put forward by the appellant and we do not also feel that the court below was not fully justified in dismissing the application. However, taking note of the facts and circumstances of the case, we are of the view that an opportunity can be afforded to the appellant to appear before the court to cross-examine P.W.1 and to adduce further evidence, on condition that the appellant shall deposit 50% of the plaint claim within a period of one month from today and shall also pay a sum of Rs.5,000/- as costs to the respondent within the aforesaid period of one month and also pay Rs.5,000/- as costs to the District Legal Service Authority, Manjeri within one month. If the appellant fails to comply with any of these conditions, the appeal shall stand dismissed and the order passed by the court below shall stand confirmed. If the appellant complies with all the conditions mentioned above, the order in

I.A.No.345/2006 shall stand set aside and the appellant shall be entitled to appear before the court and to proceed with the case. In such a situation, the court below shall dispose of the suit within a period of three months thereafter. It is made clear that no further adjournment at the request of the defendant shall be granted by the court below.

The appeal is allowed as above.

(KURIAN JOSEPH, JUDGE)

(K.T.SANKARAN, JUDGE)

ahg.